REPORT TO THE CONGRESS UNDER SECTION 282(c)(5) OF THE URUGUAY ROUND AGREEMENTS ACT

Report of the Office of the United States Trade Representative

Executive Summary

Under Article 31 of the WTO Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement"), the provisions of Articles 6.1, 8 and 9 of the Subsidies Agreement ceased to apply as of January 1, 2000. In accordance with section 282(c)(5) of the Uruguay Round Agreements Act ("URAA"), this report sets forth the provisions of U.S. law which were enacted to implement Articles 6.1, 8 and 9 and "should be repealed or modified" due to the lack of a decision by the WTO Committee on Subsidies and Countervailing Measures ("Subsidies Committee") to extend the application of such provisions beyond 1999. For the reasons specified in this report, however, it does not appear that any of the affected provisions of U.S. law in fact must be repealed or modified as a result of the lapsing of Articles 6.1, 8 and 9. We have developed this report, and the observations reflected herein, in close consultation with the agencies which administer the countervailing duty ("CVD") law as well as our Congressional committees of jurisdiction.

Background

In general, the Subsidies Agreement initially disciplined government subsidy practices[1] through a method of categorization based on the "stop – proceed with caution – go" symbolism of the common traffic light. Under Article 3, export subsidies ("subsidies contingent . . . upon export performance") and import substitution subsidies ("subsidies contingent . . . upon the use of domestic over imported goods") were designated as prohibited – or "red light" – practices. Under Article 8, subsidies provided for certain industrial research and development, regional development, and environmental compliance purposes were both permitted and non-actionable ("green light") practices so long as such subsidies conformed to the specific terms and conditions set forth in that Article for according green light status, although Article 9 provided the opportunity to obtain relief against any serious adverse effects caused by the use of such subsidies. Finally, under Article 5, all other ("yellow light") subsidies were permitted, but could be challenged through WTO dispute settlement or CVD proceedings. These subsidies became "actionable" when: (i) they were limited to a firm, industry or group thereof within the territory of a WTO Member (so-called "specific" subsidies); and (ii) they caused adverse trade effects. In addition, under Article 6.1, certain subsidies were presumed to cause such effects – *i.e.*, subsidies granted in

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[1] Although the provisions of the Subsidies Agreement govern all trade in goods among WTO Members, including agricultural products, they are modified and supplemented by the rules set forth in the Agreement on Agriculture. Accordingly, for example, export subsidies on agricultural goods are not prohibited, but are subject to reduction commitments and other obligations as set forth in the Agriculture Agreement.

certain circumstances to cover operating losses, subsidies for the direct forgiveness of debt, or the subsidization of a product in excess of five percent of the product's value. Because they were viewed as straddling the line between prohibited (red light) and actionable (yellow light) subsidies, these presumptively harmful subsidies/circumstances were referred to as the "dark amber" category of subsidies.

The Uruguay Round negotiators of the Subsidies Agreement recognized that the green light and dark amber provisions of Articles 6.1, 8 and 9 were the most novel and untested of all of the Agreement's provisions. Given that WTO Members had no or little prior experience under the GATT 1947 or the Tokyo Round Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT 1947 ("Subsidies Code") in the use of either explicit legal presumptions of serious prejudice or normative rules for exempting certain subsidies from potential CVD or multilateral subsidy remedies, the negotiators sought to provide for the review and potential termination or modification of these rules within a fixed time period in the event that they worked in an unforeseen – and undesirable – fashion. Moreover, to ensure that this review requirement would be taken seriously, the Agreement required an affirmative, consensus-based decision of the Committee in order for the provisions to remain in effect.

Accordingly, the negotiators included in the Subsidies Agreement an Article 31, entitled "Provisional Application," which reads as follows:

> The provisions of paragraph 1 of Article 6 and the provisions of Article 8 and Article 9 shall apply for a period of five years, beginning with the date of entry into force of the WTO Agreement. Not later than 180 days before the end of this period, the Committee shall review the operation of those provisions, with a view to determining whether to extend their application, either as presently drafted or in a modified form, for a further period.

In other words, Article 31 required the WTO Subsidies Committee to review the operation of the green light and dark amber subsidy rules beginning no later than July 5, 1999, with the proviso that these provisions would expire at the end of 1999 unless an explicit decision was made to keep them in force, whether as set forth in the Agreement or with modifications. As previously reported in *Subsidies Enforcement Annual Report to the Congress*, Joint Report of the Office of the United States Trade Representative ("USTR") and the U.S. Department of Commerce ("Commerce") (February 2000), the Subsidies Committee was unable to reach a consensus on this matter by the end of 1999. Absent a decision to extend their application in existing or modified form, the provisions of Articles 6.1, 8 and 9 of the Subsidies Agreement automatically lapsed as of January 1, 2000, as stipulated by Article 31. Accordingly, with the exception of non-specific subsidies, which remain non-actionable and non-countervailable, subsidies formerly qualifying as non-actionable (green light) subsidies now fall within the actionable (yellow light) category.

Various provisions of the URAA were enacted in light of Articles 6.1, 8 or 9. Some were required in order to implement the provisions of the Agreement, while others were deemed appropriate to enact, either to facilitate the United States' use of the multilateral subsidy remedies offered by the new Subsidies Agreement or to strengthen the application of U.S. CVD law. In recognition of the fact that the provisions of Articles 6.1, 8 and 9 of the Subsidies Agreement might lapse in the future, section 282(c)(5) of the URAA required USTR to submit no later than June 30, 2000, a separate report to the Congress identifying the provisions of U.S. law that "should be repealed or modified" due to such lapse. The provisions of U.S. law which correspond to the lapsed provisions of the Subsidies Agreement are set forth below. With the exception of the provision listed last – which pertains to aspects of domestic law designed to facilitate the use of multilateral remedies that address the potentially adverse effects of foreign subsidies on U.S. exports – all of the provisions involve U.S. CVD law. Although the statutory language stipulates that USTR should identify the provisions of law that "should be repealed or modified," it does not appear that any of the referenced provisions in fact require actual repeal or modification. We have developed this report in close consultation with the agencies which administer the CVD law, i.e., Commerce and the U.S. International Trade Commission ("ITC"), as well as with the staffs of the House Committee on Ways and Means and the Senate Committee on Finance.

First, it should be noted that, pursuant to section 251 of the URAA, section 771(5B)(G) of the Tariff Act of 1930, as amended, states that "[s]ubparagraphs (B), (C), (D), and (E) shall not apply on the first day of the month that is 66 months after the WTO Agreement enters into force, unless the provisions of such paragraphs are extended pursuant to section 282(c) of the Uruguay Round Agreements Act." Insofar as these subparagraphs implemented for purposes of U.S. CVD law the non-actionable subsidy provisions set forth in Article 8 of the Subsidies Agreement, this provision means that, as of July 1, 2000, the green light provisions referenced in section 771(5B)(G) automatically will no longer be effective due to the lapsing of Article 8 of the Subsidies Agreement. As for the other provisions identified below, sections 703(b)(5), 751(g)(1) and 775 of the Tariff Act and section 281 of the URAA constitute provisions whose purpose and use are in any case rendered null and void by the lapsing of the provisions of Articles 6.1, 8 and 9 of the Subsidies Agreement.[2] The remaining sections involve aspects of the application of U.S. CVD law which fall within the range of permissible interpretations of U.S. multilateral obligations, and which would not necessarily be affected by the lapsing of Article 6.1. Indeed, these provisions (relating to situations in which the ITC considers whether there is a threat of material injury or whether material injury would be likely to continue or recur in the absence of a CVD order or suspension agreement) were added to the URAA not because the Subsidies Agreement required their addition, but because it was recognized that the types of subsidies identified in Article 6.1 are especially distortive and, therefore, appropriate to consider in these types of analyses.

[2] The sole apparent exception is section 281(c)(1), which generally provides for Commerce to notify USTR whenever it identifies a subsidy described in Article 6.1 of the Subsidies Agreement during the course of a CVD proceeding. The purpose of the notification is to permit USTR to evaluate whether recourse to the multilateral subsidy remedies of the WTO would be appropriate. Since any such decision would not rest exclusively on whether the United States could actually invoke the provisions of Article 6.1 in WTO dispute settlement, it would not seem necessary to repeal or modify this provision of U.S. law.

Provisions of U.S. Law Corresponding to Lapsed Provisions of the Subsidies Agreement

Tariff Act of 1930, as amended by URAA

Section 703(b)(5) This provision establishes a special deadline for a preliminary CVD determination in situations where USTR has notified Commerce of a violation of Article 8.

Section 751(g)(1) This provision provides for a review of a CVD order or suspended investigation in situations where USTR has notified Commerce of a violation of Article 8.

Section 752(a)(6) For purposes of determining the likelihood of continuation or recurrence of material injury should a CVD order be revoked, or a suspended investigation terminated, this provision requires the ITC to consider, among other things, whether a subsidy is of the sort described in Article 6.1.

Section 753(b)(2)(B) For purposes of determining the likelihood of material injury should a CVD order under section 303 be revoked, this provision requires the ITC to consider, among other things, whether a subsidy is of the sort described in Article 6.1.

Section 771(5B) With the exception of subparagraphs (F) and (G)(ii) – which implement provisions of the Agreement on Agriculture – this provision implements the requirements of Article 8 regarding non-actionable (green light) subsidies.

Section 771(7)(E)(i) For purposes of determining whether there is a threat of material injury, this provision requires the ITC to consider, among other things, whether a subsidy is of the sort described in Article 6.1.

Section 771(7)(F)(i)(I) For purposes of determining whether there is a threat of material injury, this provision requires the ITC to consider, among other things, whether a subsidy is of the sort described in Article 6.1.

Section 775 Among other things, this provision directs Commerce to take certain actions if it is notified by USTR of a subsidy or subsidy program that is in violation of Article 8.

URAA

Section 281 Certain portions of this provision, which is entitled "Subsidies Enforcement", deal specifically with Articles 6.1, 8 or 9. The affected portions for purposes of this report are: subsection (c)(1); subsection (e); subsection (f); and paragraphs (5), (6), (7), and (12) of subsection (h).